SEVENTY-FOURTH SESSION

In re KUNICKE (No. 2)

Judgment 1248

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Hermann Gerhard Kunicke against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 27 April 1992, Eurocontrol's reply of 23 July, the complainant's rejoinder of 11 September and the Agency's surrejoinder of 26 October 1992;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles 72, 91(2) and 95 of the General Conditions of Employment governing Servants at the Eurocontrol Maastricht Centre and Articles 1, 14 and 24(2) of Rule No. 10 concerning sickness and accident insurance;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a German who is employed by Eurocontrol at its control centre at Maastricht, is covered by the Sickness Insurance Scheme provided for in Article 72 of the General Conditions of Employment governing Servants at that centre. The Scheme is subject to Rule No. 10 concerning sickness and accident insurance, and Article 14 of that Rule reads:

"Pharmaceutical products prescribed by the practitioner ... shall be reimbursed at the rate of 85%. Mineral waters, tonic wines and beverages, infant foods, hair care products, cosmetics, special diet foods, hygiene products, irrigators, syringes, thermometers and similar products and instruments shall not be considered as pharmaceutical products. ..."

By office notice 2/89 of 9 February 1989 the Director General of the Agency, "following consultations with the Medical Adviser and with the Management Committee of the Sickness Fund", announced in point 1 that "expenses arising from trace-element therapy (oligoelements), aromatherapy and phytotherapy are not reimbursed by the Sickness Fund" and in point 4 that the staff should not submit claims to the reimbursement of such expenses.

On 19 July 1991 the complainant laid claim to refund of the cost of a phytotherapeutic remedy known as "Sinupret" and prescribed by a doctor for his wife. The cost was 36 Deutschmarks. The complainant was informed by statement 9/91 of 23 September 1991 that his claim was rejected on the grounds that the expense was not refundable. In an accompanying "opinion" the Agency's medical officer declared the item to be "phyto[therapeutic]" and ticked the box marked "non-functional/unnecessary".

On 11 October 1991 the complainant submitted a "complaint" under Article 91(2) of the General Conditions of Employment alleging that office notice 2/89 was unlawful and appending a certificate from his wife's doctors saying that Sinupret was a "known and approved" remedy.

In a report on their meeting of 12 December the members of the Management Committee, to which his "complaint" had been referred, were equally divided: the staff representatives supported his claim on the grounds that office notice 2/89 was unlawful, whereas the management representatives endorsed the medical officer's opinion. For want of agreement they left the matter to the Director General. By a letter of 29 January 1992, the impugned decision, the Director General rejected his "complaint".

The complainant claimed reimbursement of 10 Deutschmarks, the charge made by the doctors for the certificate sent to Eurocontrol on 11 October 1991. He learned from statement 15/91 of 17 December 1991 that that claim too had been refused and lodged another 91(2) "complaint" on 16 January 1992. By 7 votes to 5 the Management Committee recommended rejecting it and so informed the Director General in its report of 3 April 1992. By a decision of 25 May 1992 the Director General endorsed the recommendation.

B. The complainant submits that Eurocontrol's refusal to refund the cost of a medical prescription is in breach of

Article 14 of Rule No. 10. Sinupret does not come within the list of non-refundable items in that article. By expedients like office notice 2/89 - which half of the Management Committee's members held to be "illegal" - Eurocontrol is making a mockery of medical practice by dubbing phytotherapeutic remedies "non-functional" and "unnecessary". Though it used to refund the cost of Sinupret it now throws out claims to the cost of phytotherapy altogether: does it expect staff members to tell their doctors what to prescribe?

The complainant asks the Tribunal to set aside the Director General's decision of 29 January 1992; order the refund, with interest, of the amount of the costs he incurred for the prescribed medicine and for the doctor's certificate; quash office notice 2/89 or, failing that, order that the reference to "phytotherapy" be struck out; and award him costs.

C. In its reply Eurocontrol submits that it may lawfully refuse to pay for treatment it considers "non-functional". Article 14 of Rule No. 10 does not confer entitlement to refund of the cost of any product a doctor may prescribe. As the complainant himself acknowledges, Sinupret is a phytotherapeutic remedy. It is therefore non-refundable under office notice 2/89.

In Judgment 1088 (in re Karran No. 2) the Tribunal held that Article 24(2) of Rule No. 10 empowered Eurocontrol to refuse to refund the cost of treatment which, after consulting the medical officer, it considered to be "non-functional, superfluous or unnecessary". In this case the Director General took due account of the medical officer's opinion, which rested on the lack of controlled clinical tests showing phytotherapy to be safe and effective. A doctor's certificate is no substitute for reliable clinical tests.

That the complainant may have been wrongly reimbursed in the past gives him no entitlement for the future. Nor were the views of the Management Committee's members binding on the Director General.

The complainant offers no arguments whatever in support of his claim to the cost of the doctor's certificate. Not being an expense that arose from illness, accident or confinement, it is not one the Scheme may reimburse under Article 1 of Rule No. 10.

D. In his rejoinder the complainant objects to the Agency's interpretation of several facts and contends that the matter at issue is medical, not administrative. Phytotherapy being less costly than orthodox drugs, the Scheme could well afford to pay for it. The Agency is wrong to rely on Judgment 1088, which was about organotherapy, a form of treatment irrelevant to this case. Following the criteria stated in Judgment 1148 (in re Scheu Nos. 1 and 2), the complainant produces statements by public health authorities and scientific reports that in his submission show Sinupret to be an effective licensed medicine. He presses all his claims save the one to refund of 10 Deutschmarks for the doctor's certificate.

E. In its surrejoinder Eurocontrol maintains that for the Scheme to reimburse the cost of any product recognised by the social security authorities of the country in which it is prescribed would set the Agency's own rules at nought and impair equal treatment of its staff. A classification which an outside body makes is not binding on Eurocontrol. Nor does a doctor's belief that Sinupret can help his patient afford sufficient grounds for reimbursement.

CONSIDERATIONS:

1. A doctor having prescribed for the complainant's wife a product known as "Sinupret", he claimed reimbursement of the cost of it from the Sickness Insurance Scheme of Eurocontrol. The medical officer of the Organisation took the view that as a phytotherapeutic remedy the product was non-refundable under office notice 2/89 and that it was "non-functional" and "unnecessary" within the meaning of Article 24(2) of Rule No. 10 concerning sickness and accident insurance. The Scheme accordingly refused the claim. The complainant lodged an internal "complaint" against that refusal, the Director General rejected it on 29 January 1992, and that is the decision he now challenges.

2. The final decision of 29 January 1992 rests on the same grounds as were put forward for the original refusal of the complainant's claim. The text states:

"'Sinupret' comes under the category of phytotherapy; therefore it cannot be reimbursed pursuant to the provisions of Office Notice 2/89 dated 9.2.89".

It goes on to observe that the Scheme may also, after consulting the Medical Adviser, consider a product to be -

"non-functional, superfluous, or unnecessary on the basis of Article 24.2 of Rule of Application No. 10. Such an opinion was delivered by the Medical Adviser in respect of the 'Sinupret'".

3. The impugned decision thus rests on two texts, office notice 2/89 and Article 24(2) of Rule No. 10. If the plea based on either of them is upheld, that suffices to justify the decision. For his part, the complainant must succeed in refuting the pleas under both heads if he is to have the decision set aside.

4. As in the case the Tribunal ruled on in Judgment 1148 (in re Scheu Nos. 1 and 2) of 29 January 1992, Eurocontrol relies on Article 24(2) of Rule 10 to deny reimbursement: in its submission, even supposing that phytotherapeutic remedies may be refundable under Article 14 of the same Rule, Sinupret is non-refundable under Article 24(2) because the medical officer took the view that it is "non-functional" and "unnecessary".

In Judgment 1148 the Tribunal held, in 25, in regard to a similar opinion by the medical officer:

"Since the medical officer in coming to that view is exercising his responsibility under the Rule, the complainant cannot succeed unless she adduces evidence from authorities of equivalent weight in support of her claim to refund. She merely gives the name of the product, which is just the botanical name of a common plant, and offers no evidence to cast any doubt on the soundness of the medical opinion underlying the office notice or of the medical grounds for the individual decision based thereon.".

In this case, too, the complainant cannot succeed unless he adduces "evidence from authorities of equivalent weight in support" of his claim. He has submitted evidence in support of his claim, and the Tribunal will set it against the evidence which the defendant has submitted.

5. The defendant cites the comments of the Scheme, which states that Sinupret is listed in the 1992 edition of the German Pharmacopoeia - the so-called "Red List" - under the category of "phytogenic expectorants" and is not described as being available only on prescription. The Scheme observes that, being an expectorant, it may be regarded as a "comfort medicine, with no therapeutic value" because "its purpose is not to heal an illness in the sense of [a directive of the Council of the European Communities of 26 January 1965]". The Scheme then points out that the concept of therapeutic efficacy was adopted in Judgment 1148 as one of the criteria for refunding the cost of pharmaceutical products under Article 14 of Rule 10 and concludes that "since it is not a medicine, its cost is not eligible for reimbursement".

Eurocontrol further relies on a memorandum by the medical officer to the Scheme, who comments that the signed statement from two doctors who were treating the complainant's wife, "does not provide any medical evidence in support of the product's efficacy as a clinical double-blind trial (which to my knowledge does not exist) might have done".

The Organisation also appends to its reply an excerpt from comments by the Scheme's medical officer on cases the Tribunal ruled on in Judgment 1101 (in re Cassaignau and Karran No. 3). The medical officer there recalled in the following terms the reasons given by the Medical Board of the European Communities for refusal to refund the cost of phytotherapeutic products:

"The Medical Board of the European Communities issued a negative opinion regarding the reimbursement of these products in view of the lack of scientific studies proving their efficacy and safety for use. These substances do not correspond to the criteria established in the 1965 and 1975 Directives of the European Communities, i.e.:

- clearly established composition and dosage

- proven efficacy

- safety under normal conditions of use (in view of the varying composition of the active constituents of the plants used)."

6. To rebut that evidence the complainant submits with his complaint a letter of 7 October 1991 to the complainant's wife, signed by "Mr. and Mrs. Drs. Classen", who state:*

"Sinupret since long time is a known and approved remedy in throat-nose-ear therapy. During infections of the upper respiratory tracts a secretolytic medication often becomes necessary in order to prevent complications in the

course of disease."

They add that Sinupret produces no secondary effects and that they have often prescribed it.

The complainant appends to his rejoinder further items that purport to bear out his position. One is a text headed "Free sale certificate", apparently issued by the Department of Health of the former Federal Republic of Germany in 1968 and authorising the sale of Sinupret by a German manufacturer, Bionorica, in Hong Kong. It states that the product has been authorised for use in Germany.

Then there is a certificate issued in 1984 by the Federal Ministry of Health of Austria and stating that Sinupret has been authorised for use in that country under medical prescription. Appended material includes information intended for the consumer and submitted by the manufacturing laboratory, which says that "after extensive research Sinupret is qualified as long-term medicine to reduce the danger of infection at the latent stadium of the broncholytic syndrome; the secreta become more and more liquid and finally arrive at a stop".* (*The complainant's translation into English from German.)

Third is a text, apparently reproduced from the German Pharmazeutische Zeitung, which purports to be an excerpt from an alphabetical list issued by the Federal Minister of Health of so-called "uneconomic medicaments", i.e. drugs that are not refundable by public health insurance schemes. The list does not include Sinupret.

The fourth item is a study by two doctors, identified simply as "Goroll M." and "Stehle W.", headed "Inflammation of the nasal sinuses and its medicational therapy with Sinupret" and published in 1982 in Therapie der Gegenwart 121, at pages 21 to 25. This study purports to report the results of medical experiment in the treatment of sinusitis and other conditions with Sinupret and the authors describe those results as "good" in 71 per cent of the cases treated.

Lastly, the complainant submits a list of other scientific studies apparently about Sinupret. He does not actually supply them but says that he will do so if asked.

7. Of the evidence offered by the complainant not a single item establishes that Sinupret is an efficacious remedy.

Although the study in Therapie der Gegenwart may be favourable as to the therapeutic efficacy of Sinupret, the Tribunal is not given such essential information as who the authors are - apart from their names - or where the tests were carried out. The letter by the two doctors named Classen merely asserts that Sinupret is "a known and approved remedy". The information appended to the certificate of use in Austria comes from the manufacturer and proves nothing whatever. Neither does the "free sale certificate". And the excerpt from the list in Pharmazeutische Zeitung, which does not mention Sinupret, is no proof of its efficacy either.

As for the list of other studies the complainant offers to produce, he himself must submit any evidence he considers to be material to support his case. The Tribunal will not determine on his behalf what evidence he ought to adduce.

8. The conclusion is that the evidence offered by the complainant falls far short of equivalence in weight to that submitted by the defendant.

He applies to the Tribunal for appointment of an expert to inquire into the scientific issues. His application is disallowed because the evidence he submits casts no doubt on the soundness of the medical opinion the Organisation is relying on. For the same reason the Tribunal rejects his application for hearings.

9. Having failed to rebut Eurocontrol's contention that Sinupret, being "non-functional" and "unnecessary", is non-refundable under Article 24(2) of Rule No. 10, the complainant cannot succeed. Eurocontrol's decision is upheld.

10. The complainant asks the Tribunal to set aside office notice 2/89.

In Judgment 1148, cited above, the Tribunal held, in 21:

"The Organisation ... has wide discretion in the matter and may exercise it as it sees fit for the purpose of ensuring the efficiency and financial soundness of its Fund. There is more than one legal procedure it may resort to. It may adopt general rules under Article 100 of the Staff Regulations, which empowers the Director General to issue such rules by means of 'service rulings' or else it may take individual decisions on particular cases. ..."

The Tribunal went on, in 22, to say:

"Eurocontrol acted in this instance by making a service ruling. It issued office notice 2/89, which told the staff that the cost of some forms of treatment, including phytotherapy, were not to be refunded in future. As was held in Judgment 1101, the notice is not to be treated as amending the Rule but as 'a mere warning to the staff that Eurocontrol does not intend to refund the costs of some kinds of treatment which it does not believe to have curative effect'. In this case Eurocontrol has expressly confirmed that view and that intention and there was nothing wrong with its issuing the notice in keeping with Article 100."

That ruling holds good for the staff at the Maastricht Centre, save that the material provision is not Article 100 of the Eurocontrol Staff Regulations but Article 95 of their General Conditions of Employment.

The complainant's objections to office notice 2/89 therefore fail.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 February 1993.

José Maria Ruda
P. Pescatore
Michel Gentot
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.